UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM GILMAN, Plaintiff, v. ELIOT SPITZER and THE SLATE GROUP, LLC Defendants.	Case No. 11 Civ 5843 (JPO) ECF Case **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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SUMMARY OF ARGUMENT

In 2004, when he was Attorney General, Eliot Spitzer ("Spitzer") began a misguided and ill-conceived prosecution of Plaintiff William Gilman ("Gilman") and a handful of others at Marsh & McLennan Companies ("Marsh"). Spitzer's prosecution cost Gilman his job and resulted in a five-year legal battle by Gilman in an effort to clear his name.

Finally, in July 2010, Gilman prevailed. The judge presiding over his criminal prosecution and trial, New York Supreme Court Justice James A. Yates, determined that exculpatory evidence was withheld from him and, had he had access to that exculpatory evidence, he probably would have been acquitted. The result was that in addition to the other 36 counts previously pending against him which Justice Yates had already acquitted Gilman of or otherwise dismissed, the conviction on the last remaining count was vacated.

This "famous Spitzer case ending in another embarrassment for the [New York Attorney General]'s office" resulted in an article in the *Wall Street Journal* that was highly critical of Spitzer. (Answer Ex. 1 at 1.)

Spitzer used his regular column on *Slate*.com to try to rebut the valid criticism leveled against him by the *Wall Street Journal*. Spitzer attempted to falsely portray the failure of the Gilman prosecution as a technicality and justify his actions by realleging, falsely, that Gilman had engaged in criminal conduct. These statements by Spitzer were defamation *per se*.

While Spitzer did not mention Gilman by name, he explicitly references "two of the cases against employees of the company were dismissed after the defendants had been convicted" – Gilman and his former co-defendant. Ordinary readers, particularly readers in the insurance field where Gilman was a big name prior to Spitzer's false allegations and where the Gilman

prosecution and ultimate failure thereof were high-profile events, knew Spitzer was defaming Gilman.

Spitzer is not immune from liability for his defamation. He is obviously no longer Attorney General (or Governor) and he was not rendering a fair and true report of a judicial proceeding.

There is no basis for Defendants to receive judgment as to any aspect of the pleadings and Defendants' motion should be dismissed.

STATEMENT OF FACTS[1]

Plaintiff William Gilman was an employee of Marsh from 1976 to 2004. (Compl. ¶ 4.) Gilman worked with and had an excellent reputation with respect to excess liability insurance. (Compl. ¶ 8.)

In May 2004, Defendant Spitzer, then the Attorney General for the State of New York, began an investigation of Marsh's practices with respect to so-called contingent commissions. (Compl. ¶ 9.) Contingent commissions are fees paid by insurers to insurance brokers who place insurance business with the insurer. (Compl. ¶ 10.) Contingent commissions were widely used in the insurance industry and there was nothing improper about them. (Compl. ¶¶ 10-11.) Gilman's work for Marsh involved contingent commissions. (Compl. ¶ 10.)

After months of investigation, the New York Attorney General's Office filed a civil complaint against Marsh on October 14, 2004 ("NYAG's Civil Complaint"). (Compl. ¶ 12.)

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[1] Defendants' Memorandum of Law provides a purported "Factual Background" that contains false allegations of criminal conduct against Gilman and contains inaccurate representations regarding a separate proceeding against Marsh. Such background is not relevant to the present motion. Further, as the Complaint and the outcome of the criminal allegations against Gilman and others make clear, Gilman disputes such allegations and is innocent of the alleged criminal conduct. (*See, e.g.*, Compl. ¶ 18, 21.) The facts detailed here, however, are confined to those relevant to the present motion and a failure to rebut a specific allegation by Defendants should not deemed an admission thereto.

The NYAG's Civil Complaint alleged that Marsh had engaged in fraud and fraudulent business practices and committed anti-trust and securities law violations. (Compl. ¶ 12.) Gilman is mentioned in one paragraph of the 31-page, 87-paragraph complaint. (*Compare* Answer Ex. 5 ¶ 50 *with* ¶¶ 1-87.) The allegations against Gilman were false. Despite the small involvement of Gilman in the allegations and the fact that Gilman was innocent, Gilman became the primary focus of criminal allegations against Marsh by Defendant Spitzer. (Compl. ¶¶ 13, 15.)

On January 30, 2005, Marsh and the NYAG entered into a settlement agreement resolving the NYAG's Civil Complaint. (Compl. ¶ 14.) Marsh paid $850 million into a fund to be paid to Marsh's policyholders. (Compl. ¶ 14.) No portion of the payment was paid to New York State and the agreement specifically indicated that "[n]o portion of the Fund shall be considered a fine or a penalty." (Answer Ex. 6 at 3.) Marsh did not admit any wrongdoing in the agreement. (Answer Ex. 6 at 2.)[2]

On September 15, 2005, Defendant Spitzer announced an indictment charging Gilman and seven other former Marsh employees with 37 counts: one count of a violation of the Donnelly Act, one count of Scheme to Defraud, and 35 counts of Grand Larceny in various degrees. (Compl. ¶ 12.)

Gilman and a co-defendant, Edward McNenney ("McNenney"), were tried separately from their former co-defendants on 24 of these counts – 13 of the counts of the indictment were dismissed prior to trial. (Compl. ¶ 16.) The trial was a bench trial before New York State Supreme Court Justice James A. Yates from April 2007 through February 2008. (Compl. ¶ 17.)

As a result of the trial, Gilman and McNenney were acquitted of 20 counts and an additional three counts were dismissed. *People v. Gilman*, No. 4800–2009, 2010 WL 3036983,

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[2] Marsh did issue an apology pursuant to the agreement apologizing for the actions that led to the NYAG's Civil Complaint and the citations by the New York State Department of Insurance. (Answer Ex. 6 at 16.)

at *2 (N.Y. Sup. Ct. July 2, 2010). Gilman and McNenney were initially convicted of the remaining count, a violation of the Donnelly Act, however, on July 2, 2010, Justice Yates vacated the verdict based on exculpatory evidence that the New York Attorney General failed to disclose to Gilman and McNenney during the trial. (Compl. ¶ 18.) *See also People v. Gilman*, 2010 WL 3036983, at *21. Justice Yates found that "the verdict here rested firmly upon the testimony of [six witnesses], and yet, each of them, after testifying with very favorable cooperation agreements, has, at times, before, during, or shortly after trial, given sworn testimony discrediting, even contradicting, their trial testimony." *Id.* "[T]aken as a whole, the evidence raises not only a possibility, but a probability that its disclosure would have produced a different result." *Id.*[3]

The exculpatory evidence came to light during the trial of three of Gilman's former co-defendants from the indictment. (Compl. ¶ 18.) All three were acquitted of all charges against them on October 26, 2009. (Compl. ¶ 17; *see also People v. Gilman*, 2010 WL 3036983 at *3 n.6.)

After the acquittals, Justice Yates dismissed the charges against the three remaining former co-defendants. (Halter Decl. Ex. 1 at 3.)[4]

Prior to vacating the verdict, Justice Yates had sentenced Gilman and McNenney to sixteen weekends in jail and five years probation with 250 hours of community service. (Compl. at 5 n.2.) The sentence was never served and was vacated when the conviction was vacated.

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[3] The Court can consider the July 2, 2010 decision of Justice Yates because it is a public record and because Plaintiff references the decision in his Complaint.

[4] The Courts may take judicial notice of these pleas of guilty and the ultimate disposition. facts that are "matter[s] of public record thoroughly covered in the media." *Kurr v. Mawn*, No. 08-CV-4401 (JFB)(ETB), 2011 WL 838911, at *4 (E.D.N.Y. Mar. 4, 2011) ("[T]he Court may take judicial notice of the fact that plaintiff pled guilty [but the plea allocution] may not be used to prove the truth of the matters asserted therein").

No one was ultimately sentenced to jail or given any other punishment as a result of the prosecutions related to contingent commissions at Marsh. (Compl. ¶19.) In addition to the indictment which resulted entirely in acquittals and dismissals, twenty-one people had pled guilty with respect to charges related to the investigation. (Compl. ¶ 19.) Twelve of those individuals were former Marsh employees. (Halter Exs. 1 and 2.)[5] All of the cases were resolved with dispositions of an adjournment in contemplation of dismissal,[6] outright dismissal, or unconditional discharge.[7] (Compl. ¶ 19.)

On August 13, 2010, a little more than a month after Justice Yates's decision vacating the convictions of Gilman and McNenney, the *Wall Street Journal* published an article critical of then-Attorney General Andrew Cuomo as well as Defendant Spitzer titled "Eliot Spitzer's Last Admirer." (Answer Ex. 1.) The article starts, "You can't blame New York Attorney General Andrew Cuomo for decisions made by his predecessor, Eliot Spitzer. But with another famous Spitzer case ending in another embarrassment for the AG's office, and with still more evidence of prosecutorial misconduct, New Yorkers can raise a fair question: Why is Mr. Cuomo unwilling to break with the Spitzer past?" (Answer Ex. 1 at 1.) The "famous Spitzer case ending in embarrassment" refers to the prosecution of Gilman and McNenney.

Later in the *Wall Street Journal* article, the author states,

> One would think that Mr. Cuomo would want to end the era of stonewalling, especially after the defeat his office sustained last month on still another Spitzer-created prosecution. Manhattan

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[5] The former Marsh employees that plead guilty are: Nicole Michaels, Regina Hatton, Mark Manzi, Joshua Bewlay, Peter Anderson, Edward Keane, Jr., Todd Murphy (Halter Decl. Ex. 1), Maryann Brain-Baret, Jason Monteforte, George Niccolai, Robert Stearns, and Kathryn Winter (Halter Decl. Ex. 2). Most did not receive criminal dispositions and none served sentences that included incarceration.

[6] An adjournment in contemplation of dismissal is a non-criminal disposition that results in the case being dismissed entirely after six months. N.Y. C.P.L. § 170.55.

[7] An unconditional discharge is a sentence where no punishment is imposed. N.Y. Penal Law § 65.20.

> Supreme Court Justice James A. Yates vacated the felony convictions of two former employees of Marsh & McLennan Companies because the Attorney General's office had failed to turn over potentially exculpatory evidence to the defense.
>
> Although prosecutors had earlier assured the court that "We don't want to be accused of hiding anything," Judge Yates found that the Attorney General's office had failed to turn over more than 700,000 pages of documents, plus deposition testimony from key witnesses.
>
> Once the evidence came to light, defense lawyers argued that many of the documents directly contradicted the testimony of government witnesses at trial, and Judge Yates appears to agree. "While each item of evidence taken individually may present a reasonable possibility that the verdict would have been different taken as a whole, the evidence raises not only a possibility, but a probability that its disclosure would have produced a different result," he said.
>
> By now, most reasonable people have concluded that the Spitzer method is to be shunned, not emulated. A genuine government reformer might also wish to shine the light on the way the AG's office operated during the Spitzer era. But Mr. Cuomo can't seem to let go of the Spitzer cases, nor turn the page on his predecessor's penchant for secrecy.

(Answer Ex. 1 at 1-2.) Again, the referenced "Spitzer-created prosecution" is the prosecution of Gilman and McNenney.

Defendant Spitzer responded to the criticism through his regular column on *Slate*.com. (Compl. ¶¶ 6, 23.) He states:

> The [*Wall Street*] *Journal*'s editorial also seeks to disparage the cases my office brought against Marsh & McLennan for a range of financial and business crimes. The editorial notes that two of the cases against employees of the company were dismissed after the defendants had been convicted. The judge found that certain evidence that should have been turned over to the defense was not. (The cases were tried after my tenure as attorney general.) Unfortunately for the credibility of the *Journal*, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms, or that Marsh's behavior was a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market

> while Marsh and its employees pocketed the increased fees and kickbacks. Marsh as a company paid an $850 million fine to resolve the claims and brought in new leadership. At the time of the criminal conduct, Jeff Greenberg, Hank Greenberg's son, was the CEO of Marsh. He was forced to resign.

(Compl. Ex. A at 2.)

The article was false in several respects. First, no Marsh employee, particularly not Gilman whose conviction was vacated, served jail time as a result of Mr. Spitzer's allegations. (Compl. ¶¶ 27-28.) Second, Marsh's and Gilman's behavior was not illegal and did not amount to price-fixing, bid-rigging or kickbacks. (Compl. ¶¶ 29-30.) Third, no customers were harmed by Marsh's or Gilman's actions. (Compl. ¶ 31.) And, fourth, Gilman did not receive any benefit from the actions complained of – that was not even an allegation during any of the various litigations. (Compl. ¶¶ 32-34.)

The article defamed Gilman (and McNenney). In the article, Spitzer attempted to minimize the fact that Gilman and McNenney's convictions were vacated and justify the failed prosecutions in light of the *Wall Street Journal*'s criticism of the prosecution of Gilman and McNenney, by arguing that the failure of the prosecution was on technical grounds and alleging that, regardless, Gilman and McNenney are guilty based on Spitzer's false accusations. (Compl. ¶¶ 25-35.) As such, on August 19, 2011, Gilman asserted a claim of defamation against Spitzer and The Slate Group, LLC. (Dkt. # 1.)

Defendants filed an Answer to the Complaint and asserted a counterclaim on November 1, 2011. (Dkt. # 13.) Defendants also filed the present motion for judgment on the pleading that same day. (Dkt. # 16.)

Defendants' motion for judgment on the pleadings improperly asks the Court to construe the language of Defendants' article in their favor – an interpretation not supported by the context.

Defendants' motion, at a minimum, presents questions of fact that cannot be resolved at this stage and, thus, Defendants' motion should be denied.

ARGUMENT

Defendants bring the present motion as a motion for judgment on the pleading pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The standard for a motion for judgment on the pleadings pursuant to Rule 12(c) is similar to the Rule 12(b)(6) standard in that the Court must accept Plaintiff's allegations as true and draw all reasonable inferences in Plaintiff's favor. *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009). On a motion pursuant to Rule 12(c), the court may consider "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009). All documents and allegations, whether from the Complaint or from the Answer must be viewed in a light most favorable to the Plaintiff. *See, e.g., L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).[8]

"Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible

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[8] Defendants' Memorandum of Law extensively cites exhibits to the Answer that contain allegations such as the Complaint in *People v. Marsh & McLennan Cos., Inc.*, Index No. 403342/2004 (N.Y. Sup. Ct., N.Y. Cnty. Oct. 14, 2004), the Indictment in *People v. Doherty*, Ind. No. 4800/2005 (N.Y. Sup. Ct., N.Y. Cnty. Sept. 15, 2005), and an appellate brief by the New York Attorney General's office in *People v. Gilman*, Index No. 472 (1st Dep't Feb. 11, 2009). The substance of such documents are merely allegations that constitute hearsay pursuant to Federal Rule of Evidence 802 and should not be considered as evidence at any stage of the proceeding much less in the course of the present motion where all allegations must be resolved in Plaintiff's favor. Further, the Court cannot take judicial notice of matters "subject to reasonable dispute" and Plaintiff reasonably disputes the substance of the documents containing criminal allegations against him. FED. R. EVID. 201. *See also Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (A court may only take judicial notice of allegations in other proceedings "to establish the existence of the opinion, not for the truth of the facts asserted in the opinion.") (quotations omitted). Defendants' reliance on allegations of the Indictment and appellate brief is particularly egregious as all of the charges from the Indictment either resulted in acquittals or dismissals. It is also important to note, that the appellate brief Defendants rely on was filed in February **2009**, prior to the exculpatory *Brady* information being revealed and a full 15 months prior to Justice Yates's order vacating the conviction. The New York Attorney General's office chose not to pursue an appeal of Justice Yates's order vacating the conviction.

Regardless, Defendants' citations and quotations of those allegations are nothing more than surplusage and are not germane to the narrow issues presented in Defendants' motion of whether Defendants' defamation is "of and concerning" Plaintiff and whether the defamation constituted a fair and true report of a judicial proceeding.

of a defamatory connotation." *Armstrong v Simon & Schuster*, 85 N.Y.2d 373, 380 (N.Y. 1995).[9] Even in the far more stringent summary judgment context, "the court need only determine that the contested statements 'are reasonably susceptible of defamatory connotation.' If any defamatory construction is possible, it is a question of fact for the jury whether the statements were understood as defamatory." *Albert v. Loksen*, 239 F.3d 256, 267 (2d Cir. 2001) (quoting *Purgess v. Sharrock*, 33 F.3d 134, 140 (2d Cir.1994)).

I. Defendants' Motion is Premature Under the Federal Rules of Civil Procedure

Rule 12(c) permits a party to make a motion for judgment on the pleadings "[a]fter the pleadings are closed." However, the pleadings in this matter are not closed. Defendants have asserted a counterclaim and Plaintiff has not yet provided a responsive pleading to the counterclaim. *See, e.g.*, 5C CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367 (3d ed. 2004) ("Rule 7(a) provides that the pleadings are closed upon the filing of a complaint and an answer (absent a court-ordered reply), unless a counterclaim, cross-claim, or third-party claim is interposed, in which event the filing of a reply to a counterclaim, cross-claim answer, or third-party answer normally will mark the close of the pleadings").

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[9] Contrary to Defendants' assertion, the Court should not alter the standard applicable to the present motion merely because the cause of action sounds in defamation. (Defs.' Mem. of Law at 11.) None of the cases cited refer to a change in the relevant analysis or the deference afforded to plaintiffs in a Rule 12 motion. In fact, the cited cases address only motions for summary judgment where the cause of action is ripe for decision as a matter of law which is not the case here. *See, e.g.*, *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 695 (S.D.N.Y. 1995) (discussing summary judgment "summary judgment when no genuine issue of material fact exists"); *Church of Scientology Int'l v. Time Warner, Inc.*, 903 F. Supp. 637, 640-41 (S.D.N.Y. 1982) (summary judgment); *Cardillo v. Doubleday & Co.*, 366 F. Supp. 92, 94-95 (S.D.N.Y. 1973) (summary judgment); *Karaduman v. Newsday*, 51 N.Y.2d 531, 543 (N.Y. 1980) (indicating courts must "apply the ordinary rules governing summary judgment in libel cases"). As one of Defendants' own citations points out, "[n]one of these cases suggest, however, that where genuine issues of fact are present, especially as to the degree of defendants' fault, summary judgment is appropriate." *Machleder v. Diaz*, 538 F. Supp. 1364, 1373 (S.D.N.Y. 1982) (referring to a similar proposition expressed among other cases). *See also Karedes v. Ackerley Grp.*, 423 F.3d 107, 113 (2d Cir. 2005) (cited by Defendants) ("If the words are reasonably susceptible of multiple meanings, some of which are not defamatory, it is then for the trier of fact, not for the court acting on the issue solely as a matter of law, to determine in what sense the words were used and understood.").

Further, Plaintiff has made a motion to dismiss Defendants' counterclaim. As a result, Plaintiff's responsive pleading, if necessary, would not be appropriate until after resolution of Plaintiff's motion to dismiss the counterclaim. FED. R. CIV. P. 12(a)(4).

Because Defendants' motion is premature and, if Defendants' counterclaim is not dismissed, Plaintiff will have an opportunity to supplement the pleadings, Defendants' motion should be denied.

II. Defendants' False and Defamatory Statements Concerned Gilman

"The elements of a defamation claim under New York law are 'a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*.'" *Biomed Pharm., Inc. v. Oxford Health Plans (N.Y.), Inc.*, 775 F. Supp. 2d 730, 738 (S.D.N.Y. 2011) (quoting *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999)).

In their motion, Defendants do not, and cannot, challenge Gilman's allegations of falsity, publication, fault, or harm. Instead, Defendants only challenge whether a portion of the defamatory statements are subject to a privilege and whether the defamatory statements are "of and concerning" Gilman.

In determining whether the words used are capable of defamatory meaning, "the court must not isolate them, but consider them in context, and give the language a natural reading rather than strain to read it as mildly as possible at one extreme, or to find defamatory innuendo at the other." *Weiner v. Doubleday & Co., Inc.*, 74 N.Y.2d 586, 592 (N.Y. 1989). Defendants pay lip service to this principle (Defs.' Mem. of Law at 12-13) however they go on to analyze the defamation as two fragmented provisions. When read in context as a whole, the defamatory meaning to Gilman is clear and no privilege applies.

A. *Under a Natural Reading, the Defamatory Statements Refer to and Attempt to Justify the Failed Prosecutions of Gilman and McNenney.*

The full paragraph at issue reads as follows:

> The *Journal's* editorial also seeks to disparage the cases my office brought against Marsh & McLennan for a range of financial and business crimes. The editorial notes that two of the cases against employees of the company were dismissed after the defendants had been convicted. The judge found that certain evidence that should have been turned over to the defense was not. (The cases were tried after my [Defendant Spitzer's] tenure as attorney general.) Unfortunately for the credibility of the *Journal*, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms, or that Marsh's behavior was a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market while Marsh and its employees pocketed the increased fees and kickbacks. Marsh as a company paid an $850 million fine to resolve the claims and brought in new leadership. At the time of the criminal conduct, Jeff Greenberg, Hank Greenberg's son, was the CEO of Marsh. He was forced to resign.

(Compl. Ex. A at 2.)

Even though none of the statements explicitly referred to Gilman by name, as long as he can be identified as one of the individuals covered by the communication, a defamation action is allowed. *See Algarin v. Town of Wallkill,* 421 F.3d. 137, 139 (2d Cir. 2005) (*citing DeBlasio v. North Shore Univ. Hosp.*, 213 A.D.2d 584, 584 (2d Dep't 1995) ("[W]here the person defamed is not named in a defamatory publication, it is necessary, if it is to be held actionable as to him, that the language used be such that persons reading it will, in the light of the surrounding circumstances, be able to understand that it refers to the person complaining.") (citations and quotations omitted)).

The *Wall Street Journal* article that caused Spitzer to feel the need to defend himself is highly critical of the failed prosecution of Gilman and McNenney. The *Wall Street Journal* article opens with, "You can't blame New York Attorney General Andrew Cuomo for decisions

made by his predecessor, Eliot Spitzer. But with another famous Spitzer case ending in another embarrassment for the AG's office [i.e., the prosecution of Gilman and McNenney], and with still more evidence of prosecutorial misconduct, New Yorkers can raise a fair question: Why is Mr. Cuomo unwilling to break with the Spitzer past?" (Answer Ex. 1 at 1.) The article later refers to "the defeat his office sustained last month on still another Spitzer-created prosecution" – the prosecution of Gilman and McNenney. (Answer Ex. 1 at 1.)

In this context, the natural reading of the defamatory article is that Spitzer is attempting to justify these same failed "Spitzer-created" prosecutions "ending in . . . . embarrassment" – the only ones Defendants and the *Wall Street Journal* mention – by falsely arguing that they were aimed at criminal conduct. Defendants' article defends the prosecutions of Gilman and McNenney – the two people who had their convictions overturned and the only two Marsh prosecutions described in either article – by arguing that Gilman's conviction was overturned on a technicality ("certain evidence that should have been turned over to the defense was not") and then arguing that the technicality does not mean that Gilman and McNenney were innocent. (Compl. Ex. A at 2.) Defendants attempt to bolster this claim by falsely stating that "many of Marsh's employees [had] been convicted and sentenced to jail terms." (Compl. Ex. A at 2.) Other than Gilman and McNenney, whose sentence of 16 weekends had been vacated by the same order of Justice Yates at issue, no Marsh employee received a sentence of incarceration. (Compl. ¶ 19.)

Spitzer then goes on to attempt to justify the failed prosecution of Gilman and McNenney, despite the fact that their convictions were overturned, by saying that the conduct at issue "was a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers." (Compl. Ex. A at 2.) This statement is false in nearly every

respect – there was no "abuse of law and market power," much less a blatant one; there was no price-fixing; there was no bid-rigging; there were no kickbacks; and no customers or market were harmed by any of the behavior at issue. (Compl. ¶¶ 29-31.)

Finally, Defendants further attempt to justify the failed prosecution by stating that "Marsh and its employees pocketed the increased fees and kickbacks." (Compl. Ex. A at 2.) This statement was false in that no Marsh employee received any "kickbacks." (Compl. ¶¶ 33-34.) Defendant Spitzer and his successor Attorneys General never even made such an allegation against a single Marsh employee (Compl. ¶¶ 33-34) – at least not until making that allegation in the defamatory article here with respect to the failed prosecutions of Gilman and McNenney.

Taken as a whole and read in context, Defendants' defamatory statements likely "induce an evil opinion of [Gilman] in the minds of right-thinking persons." *Dillon*, 261 A.D.2d at 38.

In essence, in the article, Spitzer articulated that, despite the fact that the prosecutions failed, he and his predecessor were "fighting the good fight" and trying to curb criminal conduct by Gilman and a handful of others. (Compl. ¶¶ 27-34.) Unfortunately for the credibility of Defendants, the "good fight" they attempt to justify was patently false.

Defendants bifurcate the defamatory statement, a single sentence, into a "First Challenged Statement" and a "Second Challenged Statement." Under Defendants' interpretation, the First Challenged Statement is "Unfortunately for the credibility of the *Journal*, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms." (Defs.' Mem. of Law at 13.) The Second Challenged Statement is "Marsh's behavior was a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market while Marsh and its employees pocketed the increased fees and kickbacks." (Defs.' Mem. of Law at 15.)

Defendants then attempt to exclude Gilman from the First Challenged Statement by arguing that, since Gilman's conviction was overturned, Defendant was not referring to him. According to Defendants "The statement at issue is plainly there to tell readers that—notwithstanding the fact that convictions of two Marsh employees had been overturned (a fact that the *Wall Street Journal* had invoked in its editorial to criticize Mr. Spitzer's investigation of the insurance industry)—there remained *other* Marsh employees who, at the time of the piece's publication, had been convicted of criminal wrongdoing." (Defs.' Mem. of Law at 14 (emphasis added).) The remainder of Defendants' argument goes on to argue as if the word "other" existed in the article. It does not.

In fact, the article cannot be read to refer to "the many [*other*] employees of Marsh who have been . . . sentenced to jail terms." Only two Marsh employees were sentenced to jail terms – Gilman and McNenney each received a sentence that included 16 weekends of incarceration. (Compl. at 5 n.2.) Of course, even Defendant Spitzer's reference to those sentences is defamatory as the very same order that vacated their convictions referenced in the preceding two sentences, also vacated the sentences. (Compl. at 5 n.2.) The plain language contradicts Defendants' attempts to read the word "other" into the article.

As the interpretation of the article leads to the conclusion that Defendants defamed Gilman here, or at least presents a question of fact, Defendants are not entitled to judgment on the pleadings.

B. *Defendants' Argument Regarding the "Second Challenged Statement" – That Spitzer Has Defamed So Many People Here That No One of Them Can Sue Him – Fails Because, Even Under Defendants' Interpretation of the Article, Spitzer is Still Referencing a Small Enough Group That Gilman Was Personally Defamed.*

As discussed in greater detail above, a defamation plaintiff must allege that "the defendant has published the matter 'of and concerning the plaintiff.'" *Gross v. Cantor*, 270 N.Y. 93, 96 (N.Y. 1936) (internal quotations omitted).

> Yet, it does not thence follow, because a man is libelled [sic] — not by name or title or other specific description of himself, but under some such description of persons as includes certain other persons, and marks the individuality of each of them as much as if they were all severally named — that therefore this is no libel, having a personal application upon which a civil suit can be maintained. The application of the injurious charge to a particular person must be made on the same principle that the meaning of the charge itself is explained. Both are to be taken according to the common understanding of men and the customary use of language. . . . [I]f it appears clearly and undeniably on the plaintiff's own declaratory statement of his case, that the charge was made against a whole body of men, such as lawyers, clergy or brewers, [etc.,] this is not a libel upon any individual of that class, and the courts must so pronounce it. But if the words may by any reasonable application, import a charge against several individuals, under some general description or general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff.

Ryckman v. Delavan, 25 Wend. 186, 199-200 (N.Y. 1840).

"Consequently, an impersonal reproach of an indeterminate class is not actionable" but defamation of definite, small group is actionable. *Gross*, 270 N.Y. at 96 (holding that complaint of approximately 12 "radio editors" sufficient) (internal quotations and citations omitted). "When the group or class defamed is sufficiently small, the words may reasonably be understood to have personal reference and application to any member of it, so that [plaintiff] is defamed as an individual. In this case he can recover for defamation." Restatement (Second) of Torts §

564A cmt. b (1977) (cited with approval by *Algarin v. Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005).

"It is not possible to set definite limits as to the size of the group or class, but the cases in which recovery has been allowed usually have involved numbers of 25 or fewer." *Id. See also Brady v. Ottaway Newspaper, Inc.*, 84 A.D.2d 226, 227, 237-38 (2d Dept. 1981) (finding summary judgment inappropriate against a group of 27 police officers alleged defamed); *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 313, 316 (S.D.N.Y. 1952) (finding defamation claims with respect to a group of 25 salesmen sufficient but claims with respect to a group of 382 saleswomen to be deficient).

Defendants attempt to parse the second clause of the defamatory sentence, which refers to "Marsh's behavior" and "Marsh and its employees," from the first part of the sentence and from the context of the article and the *Wall Street Journal* article overall. By doing so, Defendants attempt to create an interpretation of the clause as defaming all 50,000 employees of Marsh. Significantly, Defendants do not, and cannot, make such an allegation with respect to the first part of the sentence.

Defendants' reading is false because, as discussed above, the Second Challenged Statement must be read in context and, from the context, Gilman and McNenney are intended. However, even under Defendants' parsing, Gilman would still have a cause of action for defamation.

Under Defendants' interpretation, the references to Marsh would refer to the former Marsh employees that were subject to prosecution. Here, that would be the eight individuals that were indicted – Gilman, McNenney and six others – and the 12 former Marsh employees that pled guilty to charges related to Spitzer's allegations. (Halter Decl. Exs. 1 and 2.) Certainly a

reasonable reader would not conclude that Spitzer thought every single employee of Marsh engaged in "a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market while Marsh and its employees pocketed the increased fees and kickbacks." Compl. ¶¶ 29-34.)

Thus, to the extent Defendants can argue that, in the Second Challenged Statement, Spitzer was referring to a class of individuals larger than Gilman and McNenney – a proposition belied by the fact that the *Wall Street Journal* was only critical of the failed prosecution of Gilman and McNenney and that their failed prosecution is referenced immediately prior to the defamation at issue – Spitzer defamed a group of 20 former Marsh employees. Gilman, as a member of the group of 20, can still maintain an action as he was personally defamed.

The sentence following the Second Challenged Statement also belies Defendants' argument. In the next sentence, Spitzer stated "Marsh *as a company* paid an $850 million fine to resolve the claims and brought in new leadership." (Compl. Ex. A. at 2 (emphasis added).) Spitzer chose to distinguish the reference to Marsh in that sentence by adding the clause "as a company" clearly indicating that he did not mean to refer to Marsh as a company, previously.[10] In the preceding sentence, therefore, a reasonable reader would assume that Spitzer was not referring to the entire company – he was referring either to Gilman and McNenney or, at most, to the group of 20 former Marsh employees that he prosecuted.

Furthermore, the size of the group is not the only consideration in determining whether the statements are "of and concerning" Gilman. The fact that the New York Attorney General, Marsh, and the press vilified Gilman and made him the most high-profile member of the group at issue also plays a role. *See Brady*, 84 A.D.2d at 235-36 (citing, with approval, *Fawcett Pub. v*

[10] It should be noted that this statement directed to "Marsh as a company" is also false and defamatory. No portion of the $850 million that Marsh paid was a fine or penalty of any kind. (Answer Ex. 6 at 3.) Gilman, however, does not allege in the Complaint that he was personally defamed by this statement.

Morris 377 P2d 42, 51 (Okla. 1962) (upholding jury verdict of defamation with respect to a group of 60 to 70 football players where the plaintiff was the fullback who was "well known and identified" among the group)).

The defamatory statements, including the Second Challenged Statement, are "of and concerning" Plaintiff, or at least present a question of fact, and Defendants' motion should be denied.

III. New York Civil Rights Law Section 74 Does Not Apply to Defendants' Defamatory Statements

Defendants claim that the portion of the defamation they refer to as the Second Challenged Statement, does not create liability pursuant to Section 74 of the New York Civil Rights Law. However, Defendants' argument fails on two independent grounds: the defamation is not a report on a judicial, legislative, or official proceeding and because it is not "fair and true."

A. Defendants' Defamation Does Not Report on a Judicial, Legislative, or Official Proceeding

Section 74 of the New York Civil Rights Law provides, in pertinent part, that:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

N.Y. Civil Rights Law § 74.

By its explicit terms, Section 74 only applies where the relevant report is of a judicial, legislative, or other official proceeding. Where statements "do not even purport to be a report" of a judicial proceeding, and are presented in such a way as to "belie[] the notion" that there was an attempt at a fair report, the Section does not apply. *See Corporate Training Unlimited, Inc. v. Nat'l Broad. Co., Inc.*, 868 F. Supp. 501, 508-09 (E.D.N.Y. 1994).

Unlike here, Section 74 typically only applies where "the connection between the challenged report and the judicial, legislative, or official proceeding in question has been far more direct[,]" such as where an article relies on or cites a judicial opinion or official release. *Id.* at 509 (citing cases). Where it would not be obvious to an ordinary reader that statements are being made as a report on a judicial or other proceeding, Section 74 does not apply. *See Wenz v. Becker*, 948 F. Supp. 319, 323 (S.D.N.Y. 1996) (citing *Corporate Training*, 868 F.Supp. at 508-09.).

At no point in Defendants' defamation does the article purport to be a report of any judicial, legislative, or official proceeding within the scope of Section 74, nor can it reasonably be interpreted as such. Rather, Defendants' baldly reallege – or, in the case of Gilman personally benefiting from any conduct, allege for the first time – conduct on the part of Gilman as part of a response to an attack on Spitzer's term as Attorney General in the *Wall Street Journal* article. (Compl. ¶¶ 27-34.)

As such, these defamatory statements are not "reports" on a judicial or other proceeding in the sense intended under Section 74. Thus, Section 74 does not apply here and Defendants' motion should be denied.

B. *Assuming, Arguendo, That the Second Challenged Statement Constitutes a Report of a Proceeding, Section 74 Still Does Not Apply As Defendants' Defamation is Not A "Fair and True" Report of Any Such Proceeding.*

Even if, *arguendo*, Defendants' defamatory statements did qualify as a report of a judicial or other proceeding, Section 74 does not apply here because the purported report is not a "fair and true" report.

For a report to qualify as "fair and true" within the meaning of Section 74 it must be "substantially accurate." *Wenz v. Becker*, 948 F. Supp. 319, 324 (S.D.N.Y. 1996) (citing cases); *Holy Spirit Ass'n. for Unification of World Christianity v. N.Y. Times Co.*, 49 N.Y.2d 63, 67

(N.Y. 1979). In making this determination, the test is "whether the report as published would have a substantially different effect on the mind of the reader than the effect the proceeding would have had on the mind of the reader had the reader been actually present at the proceeding." N.Y. Pattern Jury Instr. – Civil 3:31 (2011). *See also Wenz*, 948 F. Supp. at 324.

Here, Defendants' defamatory statements would have had a different effect on the mind of the reader than if the reader had been present at the proceeding – regardless of the unidentified proceeding on which Spitzer was purportedly reporting. In the August 22, 2010, *Slate*.com article, Defendants state that:

> Unfortunately for the credibility of the *Journal*, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms, or that **Marsh's behavior was a blatant abuse of market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market wile Marsh and its employees pocketed the increased fees and kickbacks.**

(Compl. Ex. A at 2 (emphasis added to reflect the "Second Challenged Statement").) A plain reading of the defamation leaves the reader with at least two distinct impressions. First, that Gilman is guilty of the listed behaviors, including price-fixing, bid-rigging, and accepting kickbacks. (Compl. ¶¶ 29-34.) And second, that Gilman personally benefited from these actions which was never even an allegation in any proceeding. (Compl. ¶¶ 32-34.) These impressions stand in stark contrast with those that would have resulted had the reader been "actually present at the proceeding."

As discussed in greater detail above, Spitzer, in the article, does not at all indicate on which proceeding he is allegedly reporting. Defendants' Memorandum of Law attempts to convert the article into a report "truly and fairly summarizing the state of criminal judicial

proceedings against [Gilman] as of August 2010." (Defs.' Mem. of Law at 22.)[11] In addition to being wholly unsupported by Defendants' defamation itself, even Defendants' revisionist history fails.

Defendants' defamation certainly does not "fairly and truly" comment on Justice Yates' July 2, 2010 order vacating Gilman's conviction based on the New York Attorney General's failure to disclose exculpatory evidence. *People v. Gilman*, No. 4800–2009, 2010 WL 3036983, at *21 (N.Y. Sup. Ct. July 2, 2010.) Justice Yates found that "the verdict here rested firmly upon the testimony of [six witnesses], and yet, each of them, after testifying with very favorable cooperation agreements, has, at times, before during, or shortly after trial, given sworn testimony discrediting, even contradicting, their trial testimony." *Id.* at *21. "[T]aken as a whole, the evidence raises not only a possibility, but a probability that its disclosure would have produced a different result." *Id.* Nowhere does Spitzer provide any fair or true report of this order.

Further, Section 74 does not apply here because, when "the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding . . . the privilege does not attach as a matter of law." *Daniel Goldreyer, Ltd. V. Van de Wetering*, 217 A.D.2d 434, 436 (1st Dep't 1995). *See also* O*cean State Seafood v. Capital Newspaper, Div. of Hearst Corp.*, 112 A.D.2d 662, 666 (3rd Dep't 1985) (Section 74 "privilege does not apply when the news account of the judicial proceeding is combined with other facts or opinions to imply wrongdoing").

In *Ocean State Seafood*, for example, an outbreak of hepatitis and gastroenteritis was traced to a batch of bad clams purchased at plaintiff's (Ocean State Seafood) store. O*cean State*,

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[11] Defendants also claim that the sentence ***after*** the defamation, regarding the $850 million paid by Marsh to settle the civil complaint brought by Spitzer, was a report of judicial proceeding – the proceeding in that instance being the NYAG's Civil Complaint. However, such a claim is irrelevant here since, as discussed in footnote 10 above, Gilman does not claim he, himself, was defamed by this false statement regarding "Marsh as a company" paying a "fine."

112 A.D.2d at 663. Defendant Capital Newspaper thereafter published an article describing the outbreak as "a story about greed and sickness on the half shell[,]" and identifying plaintiff's store as the source of the bad clams. The article went on to further describe soaring clam prices resulting from the closing of clam beds due to pollution and a resulting market in "illegal clams" coming with a risk of fines. The article concluded by reporting that the plaintiff was fined $25 as a "civil compromise." What the article failed to include, however, was that the fine was "solely for a violation of labeling regulations." *Id.* at 664. The result of this omission was a suggestion of more serious wrongdoing than what was included in any qualifying proceeding (the civil compromise), and so the court concluded that the issue was one properly left for trial. *Id.* at 666.

Here, Defendants' defamation falsely alleges that "Marsh and its employees pocketed the increased fees and kickbacks." Until Defendants' defamatory article, there had never been an allegation that any Marsh employee personally profited from the alleged conduct. (Compl. ¶ 34.) Such a "report" would not be true of any of the proceedings involving Gilman, much less a fair and true report as of August 2010.

In a footnote, Defendants attempt to justify this false statement by indicating that Spitzer was engaging in "hyperbole." (Defs.' Mem. of Law at 18 n.11.) This highly-suspect claim is not supported by the language of the article in any way. Placing the allegation in context, the defamation states, "[u]nfortunately for the credibility of the *Journal*, the editorial fails to note . . . that Marsh's behavior was a blatant abuse of market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market wile Marsh and its employees pocketed the increased fees and kickbacks." (Compl. Ex. A at 2.) Apparently, Defendants want the Court to conclude, as a matter of law, that, in writing the article, Spitzer intended to criticize the *Wall Street Journal* for not engaging in hyperbole.

The very statement indicates that the *Wall Street Journal* is incredible for not reporting the false "facts" alleged by Spitzer. An ordinary reader would certainly not interpret Spitzer's comment to be hyperbole but would, instead, believe Spitzer was asserting facts that he believed the *Wall Street Journal* should have included in its article. In fact, from the text of the article, it is clear that Spitzer's motive and intent was personal to his fight with the *Wall Street Journal* and not to "fairly and truthfully" set the record straight regarding any proceeding – i.e., he was out to enhance his own tarnished image at the expense of Gilman and McNenney.

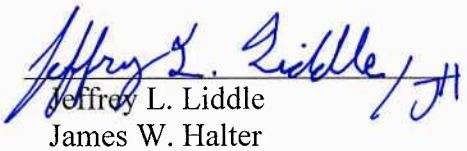
Given the lack of a factual basis for Defendants' defamatory statements, such as those concerning kickbacks and Gilman personally profiting from any of the alleged behaviors, they can only be described as "other facts or opinions" beyond the scope of Section 74. O*cean State*, 112 A.D.2d at 666. At the very least, Gilman's allegations that the article is not a fair and true report of any proceeding is an issue properly left for trial and Defendant's motion should be denied.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion for Judgment on the Pleadings be denied. In addition, if the Court is inclined to grant Defendants' Motion in whole or in part, Plaintiff respectfully requests permission to amend the complaint as appropriate.

Dated: December 13, 2011
New York, New York

Respectfully submitted,
LIDDLE & ROBINSON, L.L.P.



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